I. RELEVANT LEGISLATIVE INSTRUMENTS AND TREATIES

To properly understand EU privacy and data protection laws and requirements, it is important to understand the essential EU legislative instruments and relevant treaties. In the European Union, privacy and data protection are fundamental rights, meaning that they cannot be waived or contracted away. It is also important to note the difference between a right to privacy and a right to protection of one’s data. These two concepts are closely linked both in their history and development of legislative instruments. Nevertheless, they are distinct concepts. This book will focus on data protection law and privacy law as applied to companies in the private sector operating or offering goods or services in Europe. This section will introduce the fundamental legal instruments and treaties, specifically the EU’s enshrinement of privacy and data protection as a fundamental right, the Council of Europe’s Convention 108 (Convention 108),¹ the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD Guidelines),² both in their original form and the version as amended on July 11, 2013 (Revised OECD Guidelines),³ and finally the Directive.

A. Privacy and Data Protection as Fundamental Rights

The right to data protection is intimately associated with the right to privacy. The Council of Europe first adopted the European Convention on Human Rights⁴

(ECHR), which established a right to privacy. This right to privacy protects individuals against invasion of their personal life by public authorities unless it meets certain conditions specified in the law.5 This was followed by the right to the protection of one’s data, initially presented in Convention 108. This right was further enshrined within the European Union in the Charter of Fundamental Rights of the European Union (Charter), Article 8,6 which provides:

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

The right to privacy as established in Article 7 of the Charter is a right to “respect for private and family life: everyone has the right to respect for his or her private and family life, home and communications.”7 The Charter became legally binding on all Member States on December 1, 2009, with the entry into force of the Treaty of Lisbon, which made the ECHR legally binding in the European Union as well.

B. Convention 108

Convention 108 was the first binding international treaty in the field of data protection. It has been adopted by the European Union, by many European countries, and increasingly by non-European jurisdictions8 and is open to accession by international organizations.9 It was drafted with the aim of developing “common core of substan-

5. ECHR, art. 8, provides: “Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
7. Id. art. 7, at 393.
8. For example, Uruguay, which is not a member of the Council of Europe, has ratified the Convention 108. For a full list of signatories and the status of ratification, see http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=108&CM=1&DF=&CL=ENG.
tive law” in order to unify data protection principles in the law of the Council of Europe’s members. Specifically, Convention 108 seeks to secure individual fundamental freedoms and rights in privacy and in the automatic processing of personal data, drawing on Article 8 of the ECHR. The inclusion of these freedoms and rights creates a level of uniformity between Convention 108 signatory states, particularly in light of cross-border data flows.

Convention 108 applies to the ratifying countries and its scope extends to automated personal data files and the automatic processing of personal data—both in the private and the public sector. It establishes minimum standards for the protection of individuals that arises from collecting and using their personal data. Convention 108 targets automated files, as they have greater computing power and speed to perform a wider variety of transactions, as opposed to manual or paper files. Further, recognizing the flow of data across borders, the Council of Europe proposed an Additional Protocol obligating members to establish supervisory authorities to oversee data protection.

In 2012, Convention 108 underwent a modernization, maintaining its original core principles, but being revised to account for new challenges arising from the use of new technologies (Modernization Text). It also seeks to strengthen the follow-up mechanism for multilateral cooperation by expanding the tasks of the Consultative Committee (renamed the Convention Committee under the Modernization Text) and the powers and independence of supervisory authorities. The Modernization Text will come into force between three and four months (depending on the date of ratification) after five members of the Council of Europe have signed and ratified the text, and it will enter into force for members also between three and four months (depending on the date of deposit) after depositing the final instrument.

C. OECD Guidelines

On September 23, 1980, shortly before the publication of Convention 108, the OECD Guidelines were adopted. In light of the new technological developments and the ability to quickly transmit data (internationally), the OECD developed the OECD Guidelines (and later, the Revised OECD Guidelines) to help harmonize national legislation on privacy and data flows. The Revised OECD Guidelines aim

14. Id. art. 22, at 11.